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IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

JAMES G. JAMES,
Defendant and Appellant,
vs.
GEORGE H. APPEL,
Plaintiff and Appellee.

No. 108.

STATEMENT OF FACTS.

This action was commenced in the District Court of the First Judicial District, Territory of Arizona, in and for the County of Pima, issues of law and fact were raised by the pleadings, and after a jury trial, at which the jury were unable to reach a verdict, the cause was again tried and submitted to the Court sitting without a jury, a jury having been expressly waived.

The Court rendered and entered its judgment against the appellant on the 11th day of January, 1900, in the sum of $8,370.06 and interest. Thereafter, and

on the 11th day of January, 1900, appellant moved for a new trial. This motion was called for hearing on the 30th day of March, 1900, which was the day before the last day of the term at which the motion was made and the judgment rendered, and was on that day continued for hearing by the order of the Court until the next term of Court. At each succeeding term the motion was called for hearing, and at each time it was so called it was, on each occasion, continued until the next term (Tr., fols. 204, 205), the judge assigning as a reason for the continuance:

"That the Honorable Webster Street, Chief Justice, having sat in the trial of the cause and having since then been unable to attend the Court to hear and determine the said motion for a new trial, and it further appearing that he will be able to do so during the next term, said motion for a new trial is hereby continued until said next term."

(Tr., fols. 214, 215, 216.)

On the 29th day of May, 1901, a day to which the motion had been continued by the above orders, the Court (Hon. Webster Street, Chief Justice, sitting) heard and denied appellant's motion for a new trial and immediately upon the denial of the same appellant excepted to said order denying his motion and appealed to the Supreme Court.

(Tr., fol. 202.)

On the first day of November, 1901, appellee moved the Supreme Court of Arizona to dismiss the appeal of

James G. James on the ground that the appeal was not taken until the end of the third term after the judgment was rendered.

(Tr., fol. 206.)

This motion to dismiss the appeal was granted and from this judgment of dismissal this appeal is prosecuted.

The theory upon which the motion to dismiss the appeal was based, argued and decided,[1] was, that by a peculiar statute of the Territory of Arizona then in force, the motion for new trial was denied by operation of law at the termination of the term at which it was made, and that the time for appeal started to run from that date in spite of the orders continuing the cause until the succeeding term, and that at the time the motion for new trial was actually denied by the lower court, that Court was ruling upon a motion which had been denied by operation of law three terms prior to the date of the actual ruling of the Court.

The act of the Territorial Legislature claimed to have this effect, according to the briefs filed below, was paragraph 837, Revised Statutes of Arizona (1887), which provides:

"All motions for new trial in arrest of judgment or to set aside a judgment shall be determined at the term of the Court at which the motion shall be made."

There was, however, another paragraph of the Revised Statutes of Arizona, called to the attention of the

[1] No opinion was ever filed or delivered by the Supreme Court of Arizona.

Court, viz.: Paragraph 842, A. R. S., as amended in 1891.

As originally enacted, the Revised Statutes of Arizona contained the following provisions, which might be considered applicable to this case:—

"837. All motions for new trials in arrest of judgment or to set aside a judgment shall be determined at the term of the court at which the motion shall be made." (A. R. S., 1887.)

"842. When a motion for a new trial is overruled, the party who files the motion may except to such ruling and embody the same in a bill of exceptions, as is provided by law in other cases, and the same shall be filed and become a part of the record of the cause, and the Supreme Court shall review such ruling on appeal or writ of error." (A. R. S., 1887.)

In 1891, paragraph 842, A. R. S., was amended to read as follows:—

"When upon motion a new trial be denied the clerk shall enter the ruling on the minutes of the Court, and such ruling shall be deemed to have been excepted to by the party making the motion and the Supreme Court shall review such ruling on appeal or writ of error if carried to said court, in manner as provided by chapters 17 to 19 of said title 20. And in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then said motion shall be denied and all questions that may have been raised thereby shall be subject to review by the Supreme Court as if said motion had been overruled and exception thereto reserved and entered on the minutes of the Court."

In 1890, the Supreme Court of Arizona, in the case of *Ruff* v. *Hand*, 24 Pac. 257, decided that paragraph 837, A. R. S., operated to discharge a motion for new trial by operation of law at the end of the term at which the motion was made.

It was argued in the Territorial Court by opposing counsel that the amendment of 1891 simply allowed an appeal from the judgment rendered by paragraph 837, A. R. S., but no point was made to the effect that paragraph 842 of itself operated to deny the motion for a new trial. But as the Supreme Court of Arizona rendered no opinion in this case it is necessary to consider both paragraph 837, A. R. S., and paragraph 842, A. R. S.

SPECIFICATIONS OF ERROR.

1. That the Court erred in construing paragraph 837, Revised Statutes of Arizona (1887), as mandatory and operating of itself to deny the motion for a new trial, whereas the same should have been construed as directory only, and that the statute did not deprive the District Court of jurisdiction to hear and determine the motion for a new trial at the term to which the Court continued the same;

2. That the Court erred in construing paragraph 842, A. R. S., as operating of itself to enter a judgment

denying a new trial, for the same, at most, directs the Court to enter such a judgment;

3. That the Court erred in construing paragraphs 837 and 842, A. R. S., or either of them, as applicable to a case in which the delay in passing on the motion for a new trial is due to the Court and not to counsel, and neither of said paragraphs apply to a case where the motion for a new trial is continued by order of Court;

4. That the Court erred in construing paragraphs 837 and 842, A. R. S., as depriving the District Court of power to continue motions for a new trial;

5. That if paragraphs 837 and 842, A. R. S., correctly construed, be mandatory, and do by their own force operate to render an order denying a pending motion for a new trial upon the termination of the term at which the motion therefor is made, without any ruling by the Court and in the face of an order of the Court continuing the motion until the next term, the statutes are void on the ground that the same are an invasion of the judicial by the legislative power, and in conflict with the Organic Act of the Territory of Arizona, by which the legislative and judicial powers are separated;

6. That if paragraphs 837 and 842, A. R. S., correctly construed, be mandatory, and do attempt to deprive a defendant of a right to a new trial upon the termination of the term at which the motion therefor is made, without any ruling of the Court, and in the face of an order of the Court continuing the cause until

the next term, the statutes are void, being in conflict with section 33 of the Organic Act of Arizona, the same being section 1866, U. S. R. S., which provides:

"The jurisdiction, both appellate and original, of the courts provided for in section nineteen hundred and seven and nineteen hundred and eight, shall be limited by law."

STATUTES OF ARIZONA RELATING TO NEW TRIALS.

By chapter 18 of title XV of the Revised Statutes of Arizona (1887), the right to move for a new trial is granted in general terms. This chapter contains, among other provisions, the following paragraph:—

"837. All motions for new trial in arrest of judgment or to set aside a judgment shall be determined at the term of the Court at which the motion shall be made."

Paragraph 842 of this chapter also grants the right of appeal to the Supreme Court of the Territory from an order denying the motion for new trial and was as follows:—

"842. When a motion for a new trial is overruled, the party who files the motion may except to such ruling and embody the same in a bill of exceptions, as is provided by law in other cases, and the same shall be filed and become a part of the record of the cause, and the Supreme Court shall review such ruling on appeal or writ of error."

In 1891 this paragraph was amended and by the amendment a right of appeal was given from orders denying a motion for a new trial, based upon the ground that the motion for a new trial was not ruled upon during the term at which it was made.

The consideration of this amendment, is, however, postponed, as to determine the proper construction of a statute, the law as it stood at the time of the enactment of the statute, is to be regarded, but not amendments made subsequent to the adoption of the statute under consideration.

U. S. v. *Union Pac.*, 91 U. S. 72, 81.

I.

PARAGRAPH 837 OF THE REVISED STATUTES OF ARIZONA (1887), WHICH PROVIDES THAT "ALL MOTIONS FOR NEW TRIALS * * * SHALL BE DETERMINED AT THE TERM OF COURT AT WHICH THE MOTION SHALL BE MADE," IS DIRECTORY AND NOT MANDATORY.

Section 837 provides:

"All motions for new trials, in arrest of judgment or to set aside a judgment shall be determined at the term of the Court at which the motion shall be made."

This is a statute specifying the time within which a public officer (a judge) is to perform an official act regarding the rights and duties of others. Such statutes are uniformly held to be directory and not mandatory,

and on this point the opinions of the courts and text-writers coincide.

In Sutherland on Statutory Construction, the rule is laid down as follows:—

"Provisions regulating the duties of public officers and specifying the time for their performance, are in that regard, generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory unless the nature of the act to be performed or the phraseology of the statute is such that the designation of the time must be considered as a limitation of the power of the officer."

Sutherland on Stat. Con., sec. 448.

In Black on Interpretation of Laws, the same rule is laid down.

"When a statute specifies the time at which or within which an act is to be done by a public officer or body, it is generally held to be directory only as to the time and not mandatory unless time is the essence of the thing to be done, or the language of the statute contains negative words or shows that the designation of the time was intended as a limitation of power, authority, or right."

Black on Interp. of Laws, sec. 126.

In Endlich on Interpretation of Statutes, at section 436, the same rule is laid down, and in section 437 it is said:

"In general, statutes directing the mode of proceedings by public officers, are deemed advisory."

In the Am. & Eng. Ency. of Law (1st ed.), vol. 23, p. 458, it is said:

"Statutory prescriptions in regard to the time, form, and mode of proceedings by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply with a view to secure system, uniformity, and dispatch in the conduct of public business."

As the authorities upon this subject are almost without end, I will cite, at length, but a few of the cases in which statutes either identical with or substantially similar to the one under consideration, have been interpreted, and will cite, in most instances, but one case from any one State.

In *Rawson* v. *Parsons,* 6 Mich. 400, 404, the Supreme Court of Michigan construed a provision requiring a judge to render judgment not later than the first day of the term succeeding that upon which the cause was submitted, as merely directory, saying:

"We are all of opinion that this provision, as relates to the time within which the decision shall be given and filed, is directory merely. It imposes a duty upon the judge; but as the parties have no control over his action, it would be a harsh construction which should deprive them of the fruits of the litigation because the judge fails to decide by a particular day."

In *People* v. *Doe,* 1 Mich. 451, a statute requiring the judge to assign cases on the first day of the term was held merely directory.

Gomer v. *Chaffe,* 5 Colo. 383, is directly in point. In this case a motion was made to dismiss an appeal because, in contemplation of law, judgment had been entered denying the motion for a new trial, at the expiration of the term at which the motion was made, and that, therefore, the appeal was taken too late. The provision of the law claimed as operating to deny the motion at the expiration of the term was as follows:—

"Provided, always, the motion for new trial and decision thereon shall be made and had at the same term the findings were made or the decision rendered."

Extract from sec. 201, C. C. of Colo., 1877.

The Court said, p. 385:

"In our judgment, this section must be construed to be directory, so far as the action of the Court is required to be performed within a specified time.

"It is the duty of Courts to use all reasonable diligence in the decision of motions and other matters presented for their determination, but to say that they shall all be decided at the same term during which they are presented, regardless of their importance or difficulty, or of the time of submission, would be unreasonable. Section 203 of the Code requires the judge, upon granting or refusing a new trial, to state in writing the grounds upon which the same is granted or refused. This provision was doubtless intended to secure a careful consideration of such applications, as well as to in-

form litigants of the grounds of the decision. It not unfrequently happens that these motions are presented and argued or submitted upon briefs, on the last day of the term. In many instances they require a thorough review of the evidence, and they often involve the examination of authorities not previously brought to the attention of the Court. If the provision is to be held mandatory, the effect will be to require many of these motions to be decided without due consideration, a result which will defeat the spirit and intent of the statute."

In *Aspen Co.* v. *Billings,* 150 U. S. 31, the Court held equity rule 88, which provides that "no rehearing shall be granted (in certain cases) after the term at which the final decree shall have been entered and recorded," to be directory merely and not to deprive the Court of jurisdiction if the petition were filed in time.

In *Broad* v. *Murray,* 44 Cal. 228, section 632 of the Code of Civil Procedure, which provides:

"Upon the trial of a question of fact by the Court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision"

is held to be merely directory.

The case of *Pearce* v. *Strickler,* 49 Pac. 727, is almost identical with the case at bar.

There the rule provided that the motion for new trial must be argued, submitted, and decided at the term at which the case is tried, unless the Court expressly continue it, and that no continuance shall be for more than thirty days.

The lower court, however, failed to pass upon the motion within the time directed by the statute. The Supreme Court held the order made after the thirty days was valid, saying,

"A construction which would deprive the Court of jurisdiction of a motion while the Court was entertaining it would be highly penal and unwarranted by this rule."

Many authorities can be cited to the effect that statutes such as the one under consideration are purely directory. In the case of *Dominus Rex* v. *Ingram*, 2 Salk. 594, it is held that the failure of the magistrate to perform his duties within the time required by law did not determine his authority to perform them, and such has been the rule ever since.

The following cases from different States sufficiently show this to be the case:—

People v. *Cook*, 14 Barb. (N. Y.), 259, 290;
Gilleland v. *Schuyler*, 9 Kan. *569, *587;
Shaw v. *Orr*, 30 Ia. 355;
Bell v. *Taylor*, 37 La. An. 56;
Neal v. *Burrows*, 34 Ark. 491;
McCarver v. *Jenkins*, 2 Heisk. 629;
Boykin v. *State*, 50 Miss. 513;
McBee v. *Hoke*, 2 Speers, 138;
State v. *Carney*, 20 Ia. 82;
Huecke v. *Milwaukee*, 69 Wis. 401;
State v. *Pitts*, 58 Mo. 556;
State v. *Smith*, 67 Me. 328;

Ex parte Holding, 56 Ala. 458;
Wood v. *Chapin,* 13 N. Y. 559;
Gaston v. *Scott,* 5 Or. 48.

Reducing these general rules of construction to the specific case under consideration. In the Am. & Eng. Ency. Pl. & Prac., vol. 14, p. 902, the rule is laid down as follows:—

"Statutes requiring that the motion [for new trial] must be heard and determined at the term of the Court at which the findings are made or the verdict rendered, are construed as directory merely and do not deprive the Court of jurisdiction to determine the motion at subsequent terms."

This rule was laid down in *Gomer* v. *Chaffe,* 5 Colo. 383, already cited, and in the cases of *Larson* v. *Ross,* 56 Minn. 74, and *Gribble* v. *Livermore,* 64 Minn. 296, such statutes were construed as granting to the successful party a right to a speedy hearing, which must be asserted, but in no way as jurisdictional.

The only decisions which can be cited against the position for which we here contend, are found in the State of Texas, in which State it has been held that a statute relating to new trials, and similar to the one under discussion, is mandatory.

See

McKun v. *Ziller,* 9 Tex. 58;
Bass v. *Hays,* 38 Tex. 128.

and the decision of *Ruff* v. *Hand,* 24 Pac. (Ariz.), 257, upon which the judgment in this case is, apparently,

predicated. All that can be said of these decisions is that they are not controlling, contrary to all authority and in conflict with the general rule above contended for and not applicable to the peculiar facts of this case.

First, however, we maintain, on broad lines, and believe we have shown, that paragraph 837, A. R. S., (1887), is directory and not mandatory.

II.

PARAGRAPH 842 OF THE REVISED STATUTES OF ARIZONA DOES NOT OF ITSELF PURPORT TO RENDER A JUDGMENT DENYING THE MOTION FOR A NEW TRIAL AT THE EXPIRATION OF THE TERM AT WHICH THE MOTION IS MADE.

Paragraph 842, A. R. S., as amended in 1891, provides:

"When upon motion a new trial be denied the clerk shall enter the ruling on the minutes of the Court, and such ruling shall be deemed to have been excepted to by the party making the motion, and the Supreme Court shall review such ruling on appeal or writ of error if carried to said Court, in manner as provided by chapters 17 to 19 of said title 20. *And in case there shall be no ruling on said motion for a new trial during the term at which it was filed then said motion shall be denied and all questions that may have been raised thereby shall be subject to review by the Supreme Court as if said motion had been overruled and exception thereto reserved and entered on the minutes of the Court.*"

The language of this paragraph does not purport to be self-executing. The paragraph merely directs that under certain circumstances a certain order shall be made by the Court, viz.: Upon no ruling being made upon the motion for a new trial at the term at which the same is made, then said motion shall be denied by the Court. This is no more than saying that in certain events the Court shall render a certain specified judgment. In order to render the paragraph operative itself to render the judgment or deny the motion, it would be necessary not only to distort its language but to add thereto. It is very obvious that it was the intention of the Legislature to allow the order denying a new trial to be reviewed by the Supreme Court of the Territory on appeal, yet clearly this could not be done unless the order reviewed were the order of a Court, as the Supreme Court has no power to review legislative judgments. And the refusal or neglect of a Court to act cannot be reviewed on appeal.

Green v. *Shumway,* 14 Pac. 863;
Chambers v. *Astor,* 1 Mo. 191.

It is also well settled that only judicial action can be reviewed by writ of error or appeal.

In *Gordon* v. *U. S.,* 117 U. S. 697-704, this Court, referring to an act of Congress purporting to grant to it appellate power over certain decisions of the Court of Claims that were not judicial in their nature, said:

"It is very clear that this Court has no appellate power over these special tribunals and cannot under

the constitution take jurisdiction of any decision upon appeal unless it was made by an inferior court exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court."

See, also, *Sanborn* v. *U. S.*, 27 Ct. of Cl. 485;
Hicks v. *Murphy*, 1 Miss. (Walker), 66;
Phelps Co. v. *Bishop*, 46 Mo. 68;
Ex parte Caldwell, 3 Baxter (Tenn.), 98;
Inhabitants of Weymouth, 56 Mass. 335;
Bower v. *Cook*, 39 Ga. 27.

It is clear, therefore, that in order to effectuate the latter portion of this section,—viz., to review the order denying a motion for new trial on appeal that this order must be a judicial order, and, as shown hereafter, no judicial order can be made by the Legislature,—it must be made by the Court. Yet, to review an order or judgment on appeal or writ of error, the order must be judicial. The dilemma here is complete. If the denial of the motion is a judicial act, the act is void under well-settled principles of law, as an interference by the Legislature with the judicial power. If, however, the denial of the motion for new trial is not a judicial act, then the same cannot be reviewed on appeal by the Supreme Court. We submit that no construction having these effects should be placed upon a statute which is equally susceptible of another and different construction.

But apart from this, a statute operating of itself to render a judgment or order without any action on the part of a Court, is an anomaly. (We believe the same to be unconstitutional, as shown later in this brief.) And we submit that no Court should place such a construction upon a statute unless required to do so by the language of the statute itself, but to do so in this instance is clearly erroneous. The statute provides:

" * * * And in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then said motion shall be denied and all questions that may have been raised thereby shall be subject to review by the Supreme Court as if said motion had been overruled and exception thereto reserved and entered on the minutes of the Court."

The word *then,* as used in the act, means "in that event"; but if it be construed to mark the time at which the judgment or order shall be made, clearly it is but directory of the Court. To construe this act as itself operating to render the judgment is,

First—To defeat the very object of its passage, viz.: to allow appeals to the Supreme Court which had been cut off by the decision in *Ruff* v. *Hand,* for as there would be no judgment of the District Court, or any other Court, there could be no appeal to the Supreme Court;

Second—To convert an ordinarily worded statute into an anomalous piece of legislation, and

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Third—To change the words of the statute "shall be denied" into the words "is thereby denied." Apart from the constitutional questions involved, and hereafter discussed, such a construction as this is unwarranted and erroneous.

III.

IF, HOWEVER, THESE STATUTES, PARAGRAPHS 837 AND 842, BE REGARDED AS MANDATORY AND SELF-EXECUTING, THEY WOULD NOT APPLY TO THE CASE AT BAR, AS THE DELAY HERE WAS CAUSED BY THE ORDER OF THE JUDGE CONTINUING THE CAUSE, AND IS, IN NO WAY, ATTRIBUTABLE TO COUNSEL OR TO THE PLAINTIFF.

In the case at bar the motion for new trial was continued by the Court (see plaintiff's motion to dismiss), apparently on its own motion and for its own convenience, and as far as the first continuance was concerned, without objection of counsel on either side. Subsequently, and after appellant's time to appeal had expired and the jurisdiction of the Court had been divested—if the decision of the Supreme Court of Arizona be correct—counsel for respondent objected to the continuances which the Court continued to order, for reasons of its own, and not upon the request of appellant. These being the facts the maxim *"Actus curiæ neminem gravabit"* applies.

In *Evans* v. *Rees,* 12 Adol. & El. 167, it was held that though a rule requiring the entry of judgment within

a certain time was mandatory, yet as no laches were imputable to the party, the Court had power to enter the judgment *nunc pro tunc after the time had run.*

In *Freeman* v. *Tranah,* 74 E. C. L. 406, the same rule was under discussion, and the Court held that it could not order the entry of a judgment, as was done in *Evans* v. *Rees* unless the delay was occasioned by the Court itself, but fully approved that case, saying:

"The maxim *'Actus curæ neminem gravabit'* is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law."

Opinion of Creswell, J., p. 415.

In Elliott on Appellate Procedure, section 117, the effect of this maxim is considered with reference to statutes limiting the time within which appeals are to be taken, and the following rule is laid down:—

"It is said in general terms by the authorities to which we have referred, and by many more, that the time for taking an appeal can not be extended by agreement or by order of the Court, but, as we have shown, this rule, general and firmly settled as it is, does not always preclude an appeal and to the instances upon which it does not fully operate we add another of a different nature. Where the time is lost without the fault of the party and solely by reason of the action or non-action of the Court, the statute does not operate because the loss of time is not attributable to the acts of the parties. The rule that the delay or wrong of the Court shall not prejudice a party, rests upon the maxim 'An act of the Court shall prejudice no man.'"

In *Jackson* v. *Carrington,* 4 Exch. 41, this maxim was applied under the following circumstances:—

Plaintiff was under a peremptory undertaking to try the case at a particular sitting, and when the case came on for trial, applied for and was granted a postponement by the Court. On motion of defendant for an absolute rule for judgment, it was held that as the non-trial resulted from the action of the Court the rule would not be granted. This decision is quite close to the case at bar and illustrates the fact that where the delay arose, as in this case, from a continuance ordered by the Court, the case does not fall within the general rule.

The case of *Boody* v. *Watson,* 64 N. H. 169, S. C. 9 Atl. 794, is also in point. In this case a petition for a writ of mandate was filed within one year after an assessment was made, praying that a re-assessment be ordered. The statute gave the selectmen power to re-assess within one year after making the original assessment. The Supreme Court's decision was not made till after the year had passed. The Court held that as the petition was filed in time and the delay was due to the Court, the time lost by the action of the Court was not to be counted, saying (p. 814, Atl. R.):

"It is not denied that the plaintiffs were entitled to judgment when they brought this suit, and for ten months afterwards. The legal construction of statutes is the ascertainment of the fact of legislative purpose from competent evidence. *Edes* v. *Boardman,* 58 N. H. 580, 592; *Burke* v. *Concord R. R.,* 61 N. H. 160, 233; *State* v. *Hayes,* Id. 264, 330; *Sargent* v. *School*

District, 63 N. H. 528-530; 2 Atl. Rep. 641; *Whitney* v. *Whitney,* 14 Mass. 88, 92.) And upon sound principles of construction we cannot find the fact that the Legislature intended mere lapse of time should bar the plaintiffs' rights of action while it was in the custody of the law, and they could do nothing but wait for judgment. The intention of the Legislature was such that suits should be brought, and submitted to the Court for decision, and that judgments should be rendered for the reversal of such illegal exemptions. And the risk, on the one hand, of rendering judgment against the legal merits upon insufficient deliberation, and the certainty on the other hand, of a judgment entirely regardless of the merits if time were taken for their due consideration, would be a needless dilemma, that cannot be respectfully attributed to the purpose of the law-making power. The decision which the Legislature meant the Court should make is upon the merits, and after requisite investigation. * * *

"It is an old doctrine that things happening by an invincible necessity, though they may be against common law, or an act of parliament, shall not be prejudicial. 'When statutes are made, there are some things which are exempted and foreprized out of the provisions thereof by the law of reason, though not expressly mentioned. Thus things for necessity's sake, or to prevent a failure of justice, are excepted.' (Potter's Dwar. St. 123.) 'The law itself, and the administration of it, must yield to that to which everything must bend—to necessity. The law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling them to impossibilities; and the administration

of laws must adopt that general exception in the consideration of all particular cases.' (*The Generous,* 2 Dod. 322, 323; *Hall* v. *Sullivan R. R.,* 21 Month Law Rep. 138.) The general exception is a general rule of statutory construction.

"'As a general rule, when a duty *is at the proper* time asked to be done, and improperly refused to be done, the right to compel it to be done is fixed, and is not destroyed by the lapse of the time within which in the first place the duty ought to have been done.' (*Lewis* v. *Commissioners,* 16 Kan. 102, 108.) * * *

"When a statute extending the term of a patent right provides that the right shall cease if it becomes vested, at any one time, in a certain number of persons otherwise than by devise or succession, an involuntary assignment in bankruptcy, being an act of the law, is an implied exception. (Dwar. St. 124.) In *Mattingly* v. *Boyd,* 20 How. 128, on a process of foreign attachment, the trustee was restrained from paying his debt by an order of Court. The suit abated by the plaintiff's death after the restraining order had been in force twenty-six years. During that time, the right of action of the trustee's creditor and the Statute of Limitation were suspended because the fund was in the control of the law. The intended exception of such a case, not expressed in the statute, was implied by the general rule of construction. * * *

"If there is a year's limitation of the corrective power it has been suspended in this case by the Court's deliberation, as it would have been during a delay caused by a belligerent closure of the Court, or the death or sickness of the judges, *or a continuance for argument on account of a press of judicial business. Actus curiæ*

neminem gravabit, is an application of the principle, *actus legis nemini facit injuriam.* (Broom, Leg. Max., 86, 89.) A continuance for advisement is an act of the law; and where a party dies after such a continuance and before judgment, the law can work out its scrupulous abstention from injury by imagining a judgment rendered at a former term, refusing to see in its own record explicit proof of the date, and finding in the fiction a mode of applying the rule, that its own act works no wrong. A mode of applying the rule without artifice would be found in an undisguised record of the adjudication that the judgment has the same effect as if it had been rendered before the party's death. If fictitious proceedings were needed for the application of the rule in this case, they would easily be supplied. The tax could be assessed by this Court in a judgment rendered as of December term, 1884. But the provision, implied by the ordinary statutory construction, against the requirement of an impossibility, and against the infliction of a wrong by an act of the law, can be administered without antedating the assessment. The law has kept on foot its superintending duty of correction while it continued the case for advisement, and withheld from the plaintiffs the judgment and process to which it had given them a good title, and for which it had invited and induced them to incur the expense of this suit. Their promised protection has been unavoidably delayed; but the law does not wantonly destroy the right which its promise has drawn into its judicial possession, and has no occasion to resort to any other than a straightforward mode of announcing and recording the date and effect of its jdugment."

In *Gray* v. *Brignardello,* 1 Wall. 627, 636, this Court said a *nunc pro tunc* order is always admissible when

the delay was occasioned through the act of the Court.

See also

Fishmongers Co. v. *Robertson,* 3 M. G. & S. 970.

In *Bell* v. *Bell,* 181 U. S. 175, 179, this Court said that the rights of a party should not be affected by a delay of the Court.

We believe, in view of the foregoing authorities, that even if paragraph 837, A. R. S., should be construed as mandatory, yet, as the delay in this case was occasioned by the act of the Court, the statute must be read as excepting from its operation such cases, and if this is not done, then the order of the District Court of the Territory denying the motion for a new trial must be considered as a *nunc pro tunc* order, and as the appeal was taken immediately upon the making of the same, it must be considered as having been taken in time. See

Elliott on Appellate Proceedings, sec. 117 (*supra*).

We now reach a question on the construction of these acts, which, in some lights, is a constitutional question, and yet should, we believe, be presented rather as a question of construction, viz.: Whether or not paragraphs 837 and 842, A. R. S., should be construed (supposing we are wrong in our prior contentions) so as to deprive the Courts of Arizona of the power to continue motions for new trials. Undoubtedly acts may be passed conferring a jurisdiction upon Courts so limited as to time that if the Court does not act within the time prescribed it cannot act at all. But it is equally clear that the acts

under consideration are not such acts. Paragraph 837, at most, but prescribes the time within which an act shall be done, and paragraph 842 but prescribes what judgment the Court shall enter. But we respectfully submit that this failure of the Court to act, contemplated by the statute, must, in some way, be attributable to the fault of the parties and does not include cases where the Court has so far acted upon the case as to expressly continue the same, for to so construe the statute is to deprive the Court of the power to regulate its own calendar and continue causes pending a power inherent in the Court itself.

IV.

SECTIONS 837 AND 842, A. R. S., DO NOT APPLY TO CASES IN WHICH THE HEARING OF THE MOTION HAS BEEN CONTINUED BY ORDER OF COURT.

The Courts of Arizona are created by Act of Congress, and it is too clear to require argument, that a Court created by Act of Congress cannot be shorn of its inherent powers by an Act of the Territory in which it is constituted.

If then, the power to grant a continuance, is an inherent power of the District Court of Arizona, paragraphs 837 and 842, A. R. S., must be and should be construed as excepting from their operation cases in which continuances have been ordered.

In 4 Am. & Eng. Ency. of Pl. & Prac., at page 825, the rule is laid down as follows:—

"The power to grant or refuse continuances is inherent in all Courts, and necessary for the promotion of justice and the prevention of delay."

In *Caswell* v. *Ward,* 2 Douglass (Mich.) 374, 375, the Court held that the power to continue a cause was clearly an inherent power of all Courts, saying:

"Is it not clear that the right to continue is an incident to the power to hear and determine causes like that under consideration? If not, it is certain that the grossest injustice might be done."

In *Burris* v. *Wise,* 2 Ark. 33, 41, the Court said:

"It has been correctly argued by the counsel for the appellant, that the power to grant or refuse continuancy, is a sound, discretionary, legal power, inherent in all Courts, and given for the express purpose of preventing delay and promoting the ends of justice."

In *Caughlin* v. *Blake,* 55 Ia. 634, 637, the Court said:

"The justice has the inherent power to continue the cause or suspend the trial until an executor may be appointed, and the proper parties may be brought before the Court."

In *Burt* v. *Williams,* 24 Ark. 91, the Court held that an act of the Legislature purporting to continue all cases then pending in the Courts of the State was void as it constituted an infringement by the legislative upon the judicial power.

Of course we do not wish to be understood to contend that the Legislature has not the power to prescribe what shall constitute sufficient cause to entitle a

party to a continuance. The power to make reasonable rules upon this subject is undoubted, but we do contend that the Legislature cannot take away from the Court the power to regulate its own calendar. The distinction here is the same as that drawn by the Supreme Court of California in the cases of *Spreckels* v. *Hawaiian Commercial Co.,* 117 Cal. 377, 381, and *Wright* v. *Superior Court,* Supreme Court of California, in Banc, June 26, 1903, where it is said:

"Certainly it [the Court] still has jurisdiction in all cases in equity notwithstanding these provisions of the Code [provisions limiting the right to injunctions to certain enumerated cases]. The trouble there is not that the Court has not jurisdiction which it has, but that the plaintiff, under the present law, cannot make a case which entitles him to relief."

Spreckels v. *Hawaiian Commercial Co.,* 117 Cal. 381.

In conclusion, on this branch of the case, we respectfully submit:

(1) That paragraph 837, A. R. S., is directory and not mandatory;

(2) That paragraph 842, A. R. S., is not self-executing and does not by its own force render a judgment.

(3) That if we are wrong in these contentions and the statutes be considered mandatory and self-executing, still neither paragraph 837 nor paragraph 842 have any application here, as the delay in this case occurred not through any fault or neglect of ours, but by the

action or inaction of the Court, and, therefore, the maxim *"Actus curiæ neminem gravabit"* applies;

(4) That neither paragraph 837 nor paragraph 842, A. R. S., apply to cases where the Court has expressly continued the cause, as to construe them to apply to such cases would be to place a construction upon the statutes rendering them unconstitutional, when they are susceptible of and demand a construction entirely unobjectionable.

Inasmuch as the Supreme Court of Arizona rendered no opinion in this cause, it has been necessary to consider whether or not its decision could be upheld under section 837, A. R. S., and if not, could it be upheld under section 842, A. R. S., as amended in 1891? We believe it is clear that section 837, A. R. S., cannot be considered as supporting the judgment, as that statute is purely directory, and further, that the peculiar facts of this particular case do not bring it within the purview of the act. We also believe it is equally clear that section 842, A. R. S., does not support the judgment because it is not self-executing and does not purport *"ex propria vigore"* to deny the motion for a new trial, but merely directs the Court to do so. And further, that it also is not applicable to the peculiar facts of this particular case. But assuming that we are in error in these contentions, it is clear that the judgment of the Supreme Court of the Territory is predicated upon the fact that one or the other of the provisions is itself operative to deny a motion for a new trial at the

end of the term at which the motion is made, regardless of the merits of the motion, and solely upon the ground that the Court has failed to pass upon the same and in the face of an order of the Court continuing the motion to a future day.

If this be the correct construction of either of these acts, we respectfully submit that the particular act by which this result is obtained is void, as such a statute violates the provisions of the Organic Act of the Territory in the following particulars:—

(1) It is an attempted exercise by the legislative power of functions purely judicial and confided only to the judiciary by the Organic Act of the Territory;

(2) It is an attempt to limit the jurisdiction of the District Court in a manner not permitted by section 1868, U. S. R. S.

V.

IF THE DECISION OF THE SUPREME COURT OF ARIZONA BE CORRECT AS TO THE INTERPRETATION OF THE STATUTES OF ARIZONA, THE STATUTES ARE VOID AS AN ATTEMPTED USURPATION BY THE LEGISLATURE OF THE JUDICIAL FUNCTIONS.

Organic Act.

By the Organic Act of the Territory of Arizona the judicial and legislative functions of government are separated. Section 1908, U. S. R. S., provides:

"The judicial power in Arizona shall be vested in a Supreme Court and such inferior courts as the legislative council may by law prescribe."

And by sections 1864 and 1865, U. S. R. S., the Supreme Court and District Court of the Territory are provided for and created.

Section 1866 provides:

"The jurisdiction, both appellate and original, of the Courts provided for in section nineteen hundred and seven and nineteen hundred and eight, shall be limited by law."

And section 1868 provides:

"The Supreme Court and the District Courts, respectively, of every Territory, shall possess chancery as well as common-law jurisdiction."

By section 1846 the legislative power of the Territory is vested in the Governor and Legislative Assembly. And in no part of the organic law does it appear that any judicial functions are given to that body.

From the foregoing provisions it seems clear that under the Organic Act of the Territory the judicial power is vested in the Supreme Court and District Court, and such other Courts as the Legislature may create (1908, 1864, 1865), and that the Supreme Court and District Courts of the Territory shall possess both chancery and common-law jurisdiction (1868), which jurisdiction, both appellate and original, shall be limited by law (1866). Whereas the legislative power is

vested in the Assembly and Governor. Clearly then it cannot be said that the Assembly and Governor can exercise any but legislative powers, as those are the only powers delegated to them.

It has been frequently decided that where, by the Constitution of the State the legislative power is entrusted to one branch of the government and the judicial power is confided to another, any act by the legislative power, judicial in its nature, is void.

In *Kilbourn* v. *Thompson,* 103 U. S. 168, 192, the question arose as to whether or not Congress possessed judicial powers other than those expressly granted by the Constitution. The Court, speaking by Mr. Justice Miller, said:

"The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred."

In *Butler* v. *Saginaw Co.,* 26 Mich. 22, 27, Judge Cooley laid down the rule as follows:—

"It is well settled that the apportionment of the legislative power to one department of the government will not authorize it to exercise any portion of the judicial power which is apportioned to another department. The apportionment is of itself an implied prohibition upon its exercise by the Legislature."

In fact it is well settled that the creation of a department for the exercise of the judicial power constitutes of itself a delegation to that department of all the judicial power of the sovereignty except as otherwise limited by the Constitution itself.

Greenough v. *Greenough,* 11 Pa. St. 489;
Alexander v. *Bennet,* 60 N. Y. 204;
Van Slyke v. *Ins. Co.,* 39 Wis. 390;
Cooley on Const. Law, p. 35.

The general principle being that a grant of general powers to one department of government impliedly excludes all other departments of government from the exercise of the powers granted to the first.

Cooley on Const. Lim. (6th ed.) 104;
Montesquieu Esprit des lois, p. 11, c. 6;
Story on Const., 518, 525.

In the case at bar the Legislature of Arizona has passed an act, which according to the Supreme Court of that Territory, of itself operates to deny a motion for a new trial while the same is pending before the Court. And, further, according to the statutes this legislative order is an appealable order and an appeal may be taken therefrom to the Supreme Court of the Territory, although no method is provided for the entry, recording, or authentication thereof.

This, we submit, is an anomaly. But to return to the question of the nature of an act rendering such a judgment or order.

A judgment has been defined as follows:—

"The official decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination."

Black's Law Dict.

"The decision or sentence of law given by a court of justice or other competent tribunal as the result of proceedings instituted therein for the redress of an injury."

3 Bl. Comm. 395;
Bouvier Law Dict.

It seems from the foregoing definitions that a judgment is in its nature an emanation from a judicial tribunal and that the rendition of a judgment is a judicial function.

In code States the distinction between an order and a judgment is that a judgment is the final determination of an action, whereas an order is the direction of a court or judge not included in the final determination of an action.

N. Y. Code, sec. 400.

It is clear, however, that both emanate from a judicial tribunal and are made in the course of a proceeding pending before it.

In the case at bar a motion addressed to a Court is denied, not by the Court, but by the Legislature without any action on the part of the Court, and the legislative judgment or order is reviewable on appeal as the

judgment or order of the Court. Clearly if the rendition of a judgment upon a motion pending in a Court is not a judicial function, no function can be considered as judicial, as the rendition of a judgment in accordance with the law is the province of the Court. As said by the Court in *Penn.* v. *Wheeling Bridge Co.,* 18 How. 440, "the judicial power is exercised in the decision of cases; the legislative in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the pleadings and evidence in a case."

But here the law seeks of itself to apply the law. We have been able to find no case in which an interference with the judicial power has been carried to this extent, but the following decisions illustrate the fact that passing judgment upon proceedings pending in courts is beyond the powers of a legislative assembly:—

The Supreme Court of Tennessee has said:

"The powers of the State of Tennessee are vested in legislative, executive, and judicial departments, each separate and distinct from the other, with their powers and duties well defined by the Constitution, and by which each is kept within its appropriate sphere of action. The Legislature can make the law, but the courts must expound it and execute it, with the aid of the executive, when his action may become necessary for that purpose. The Legislature has no power to interfere with the administration of justice, either criminal or civil in the courts; a resolution that a criminal or class of criminals shall be discharged by the court, is then necessarily an assumption of power not war-

ranted. After conviction the Governor may pardon, but before conviction the Attorney-General and the Court are the only power that can discharge without acquittal, and this by *nolle prosequi.*"

State v. *Fleming,* 46 Am. Dec. 73, 74; 7 Humph. (Tenn) 152.

Or, as put by the Supreme Court of California in *Ex parte Schrader,* 33 Cal. 279:

"The distinction between legislative and judicial power lies between a rule and a sentence."

In the Tennessee case the judgment is made by the Legislature, and in no sense can the rendition of a judgment in any particular case or in all causes, be considered as a legislative function. Otherwise courts could be abolished and laws be self-executing.

Judge Field said in the Sinking Fund Cases, 99 U. S. 761:

"The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."

In *Jones* v. *Perry,* 10 Yerger (Tenn.) 59, (30 Am. Dec. 430, 432), the Court said:

"The Legislature can not sit in judgment, try causes, and apply the rules of law to them, make decrees, and much less can they make decrees in the exercise of an arbitrary power, independent of and in opposition to the rules of law."

Speaking of the validity of an act of the Legislature which attempted to grant a new trial, the Supreme Court of New Hampshire said:

"No particular definition of judicial powers is given in the Constitution; and considering the general nature of the instrument, none was to be expected. Critical statements of the meanings in which all important words were employed would have swollen into volumes; and when those words possessed a customary signification, a definition of them would have been useless. But 'powers judicial,' 'judiciary powers,' and 'judicatories,' are all phrases used in the Constitution; and though not particularly defined, are still so used to designate with clearness that department of government which it was intended should interpret and administer the laws. On general principles, therefore, those inquiries, deliberations, orders, and decrees which are peculiar to such a department, must, in their nature, be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employments of judicial and legislative tribunals. *The former decide upon the legality of claims and conduct; the latter make rules upon which in connection with the Constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases.* (Bac. Stat. 11; 2 Cranch, 272; 7 Johns. 498; *Dash* v. *Van Kleeck*, 5 Am. Dec. 291.) *In fine, the law is applied by the one, and made by the other. To do the first, therefore, to compare the claims of the parties with the laws of the land before established, is, in its nature, a judicial act.* * * The grant of a new trial belongs to the courts of law from immemorial usage. The power to grant a new

trial is incidental to their other powers. It is a judgment in relation to a private controversy, affects what has already happened, and results from a comparison of evidence and claims with the existing laws. It will not be denied that the consideration and decision by the Superior Court of the motion for this same new trial was an exercise of judicial power. If so, a consideration and decision upon the same subject by the Legislature must be an exercise of power of the same description; for what is in its nature judicial to-day must be judicial to-morrow and forever. The circumstance, also, that the Legislature themselves did not proceed to make a final judgment on the merits of the controversy between these parties, cannot alter the character of the act granting a new trial. To award such a trial was one judicial act, and because they did not proceed to perform another by holding that trial before themselves, the first act did not become any more or less a judicial one. We apprehend, therefore, that the character of the act under consideration must be deemed judicial. This position will probably be less doubted than the position that our constitution has not confided to the Legislature the power to pass such an act. But that power, if confided, must be exercised by the Legislature as a branch of the judiciary, or under some special provision, or as a mere legislative body."

Merrill v. *Sherburne,* 8 Am. Dec. 52, 56-58, 1 N. H. 199.

In a case arising in Rhode Island the validity of a statute granting a new trial in a cause under consideration in the courts was construed. The Supreme Court, referring to the act, said:—

"The judicial power is exercised in the decision of *cases;* the legislative, in making general regulations, by the enactment of laws. The latter acts from considerations of public policy; the former is guided by the pleadings and evidence in *the case.* Per Mr. Justice McLean. *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 Howard, 440. Indeed, laws and courts have their origin in the necessity of rules and means to enforce them, to be applied to cases and controversies within their jurisdiction; and our whole idea of judicial power is, the power of the latter to apply the former to the decision of those cases and controversies. To affect to decide, or to control the decision of, a case or controversy which has arisen at law or in equity, or to interfere with its progress, or to alter its condition in any way, is to assume the exercise of judicial power; and that, too, although the subject of the case or controversy might have been such in its nature, that the Legislature could have acted upon it, had it seen fit, without the aid of the courts. * * *

"But, without pursuing any further the cases illustrating what is, and what is not, judicial power, in a constitutional sense, we think that every one must admit that the Court of Common Pleas for the County of Providence, when, in the suits of the plaintiffs in this case against the Oneco Manufacturing Co., it attached, by its process, the property of that company in the hands of the defendants; received the affidavits of the latter, and upon the basis of them, and for the purpose of enforcing the attachment, gave judgment against the company; that, when, as the next step in the stated course of such proceeding, under our law, it entertained, heard with a jury, and took their verdict, found under its direction for the plaintiffs in this case, against

the defendants, as garnishees in the former suits, *it was* in the exercise of judicial power in the most rigid constitutional sense of the term. It was, in a matter placed by law within its jurisdiction, applying the established rules of that law to a case brought by the plaintiffs against the defendants, for the purpose of having the Court apply to it, and to enforce in their favor, those rules. To interfere with this jurisdiction; to disturb and control the exercise of this power in such a case; to take the case out of the settled course of judicial proceeding in that court; to set aside its verdict; to open its judgment; and to give the defendants leave to amend their affidavits, was, therefore, not only the exercise of judicial power on the part of the General Assembly over this court and case, but of judicial power of the most eminent and controlling character. * * * *Grant that the vote in question, so far as it dispensed with the general law applicable to this case, and made a new law for it, was remedial and legislative in its character, yet this, certainly, would not prevent it from being also judicial, so far as it set aside a verdict, and granted a new trial in a case pending in a court of law, or so far as it opened final judgments in such a court, and gave authority to the defendants to amend their old affidavits as garnishees, or to substitute new ones, nunc pro tunc in their place. That the General Assembly assumed judicial power in this case, that it might render efficient the application of its legislative power to it, does not render the former assumption less, nor the power assumed less, judicial in its nature and character, in the constitutional sense of that power."*

Taylor & Co. v. *Place*, 4 Rhode Island (1 Ames), 324, 337-340.

On the same subject the Supreme Court of Pennsylvania said:—

"If anything is self-evident in the structure of our government, it is that the Legislature has no power to order a new trial, or to direct the Court to order it, either before or after judgment. The power to order new trials is judicial; but the power of the Legislature is not judicial. It is limited to the making of laws; not to the exposition or execution of them."

De Chastellux v. *Fairchild*, 53 Am. Dec. 570, 15 Penn. St. 18.

On the same subject the Supreme Court of Indiana said:—

"There is no section of the constitution permitting the Legislature to grant new trials. The granting of a new trial is a judicial act, and in this State controlled by settled rules of law. If an inferior court should in any given case exercise the power to grant new trials, in violation of these settled rules, this Court would set aside the grant, and leave the judgment rendered unaffected."

Young v. *State Bank*, 58 Am. Dec. 630, 631, 4 Ind. 301.

The foregoing authorities clearly show that the granting of a new trial is a judicial function, and that the Legislature cannot exercise such a power; we respectfully submit that, if the granting of a new trial is a judicial function, the denial of a new trial is equally a judicial function. All rulings on pending causes are

judicial acts. As was said by the Supreme Court of Tennessee:

"Who would be safe if the Legislature were permitted to dictate the decision of causes pending? What would be the use of courts under such a state of things? They would be mere instruments in the hands of others; and all their powers and usefulness would be paralyzed. They might make records and issue process; but the mind and independence would be gone, and with these would also go responsibility, for if the agent be not free to act, there should not be accountability; hence arises the great necessity of courts looking to their own constitutional rights and powers, and firmly disregarding all attempts at innovation upon them. Admit the principle that the Legislature at pleasure can take from or add parties in causes pending, and how can the Court look forward to results?"

Officer v. *Young*, 26 Am. Dec. 268, 269, 5 Yerger (Tenn.), 301.

"Whenever an act of the Assembly, therefore, is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right, which is not a legislative but a judicial function. * * *

"The only sense in which that transaction cannot be called judicial is that no court of justice could have pronounced the judgment under the existing laws upon the state of facts in this case. To have authorized such a sentence by a court, further legislation would have been necessary. It is true, then, that the act is not purely judicial. But this is all that can be said in

support of it. It is certainly as true that it is not purely legislative."

Hoke v. *Henderson,* 25 Am. Dec. 675, 686-687, 4 Devereux's Law, 1.

In *Saunders* v. *Cabaniss,* 43 Ala. 173, the Supreme Court of Alabama held an act attempting to grant new trials to be void as an infringement by the legislative upon the judicial powers.

In Sedgwick on Statutory and Constitutional Law, pp. 166-167, it is said:—

"The Legislature is to confine itself to making laws and cannot make decrees."

Judge Cooley says:—

"The legislative power extends only to the making of laws and its exercise is limited and restrained by the Federal and State Constitutions."

Cooley's Constitutional Limitations, p. *91.

In the case of *Marpole* v. *Cathers, Admr.,* 78 Va. 239, an act directing a court to grant new trials and to open judgments recovered after its passage for purely arbitrary reasons, was held unconstitutional, as an invasion by the legislative upon judicial function, and it was further held that the fact that the act was prospective and that the contract upon which the judgment was rendered was entered into after its passage did not in any way affect the matter.

The preceding cases clearly show that the Legislature has not the power to grant a motion for a new trial in any particular case. These decisions, however,

are not based upon the theory that such an act, confined to a particular case, is special legislation, but, on the contrary, go upon the view that the granting or refusing of a new trial is a judicial act. This being so, they are in point, as the fact that the Legislature has undertaken to deny motions for new trials in a class of cases does not make the nature of the legislative act denying a motion for a new trial any the less a judicial act. As said by the Supreme Court of New Hampshire:—

"That which is in its nature judicial to-day must be judicial to-morrow and forever,"

Merrill v. *Sherburne, supra.*

and that which is judicial in one case is judicial in all cases. So, by making the act general in its operation, in this respect the Legislature has not changed its nature, but only enlarged its scope.

The act condemned in *Marpole* v. *Cathers, Admr.*, 78 Va. 239 (*supra*), was a general act prospective in its view, but this did not save it, as the Legislature had required the Court to grant new trials for arbitrary reasons in no way connected with the cases under consideration; just as in this case a new trial is denied on similar grounds.

It would seem, therefore, that unless Legislatures possess the power to render judgments this act is void, and further, and altogether apart from this, in so far as the legislative act purports to render a judgment denying a motion for a new trial irrespective of the merits of the controversy, it is for this reason alone

void. So, even if it were mandatory to the Court, and were construed with this exception—as the Supreme Court of Arizona has construed it—it is condemned by the rule laid down by *Marpole* v. *Cathers, Admr.* (*supra*), as it directs a new trial to be denied for reasons having nothing to do with the merits of the case, and upon the happening of events without the control of either party.

It seems obvious that even as directing a legislative judgment, if such a thing were permissible, the act in question is void, as the Legislature could not predicate its judgment upon facts which it could not lawfully make the basis of a judicial decree.

VI.

IF THE CONSTRUCTION PLACED BY THE SUPREME COURT OF ARIZONA UPON PARAGRAPHS 837 AND 842 BE CORRECT, THESE STATUTES ARE VOID, BEING IN CONFLICT WITH SECTION 1866, U. S. R. S., THE SAME BEING SECTION 33 OF THE ORGANIC ACT OF ARIZONA, WHICH SAID STATUTE PROVIDES:—

"The jurisdiction, both appellate and original, of the courts provided for in sections nineteen hundred and seven and nineteen hundred and eight shall be limited by law."

By the Organic Act of the Territory of Arizona, the judicial power, as heretofore shown, is vested in the Territorial Courts.

Section 1868, U. S. R. S., provides:—

"The Supreme Court and the District Courts, respectively, of every Territory, shall possess chancery as well as common-law jurisdiction."

Section 1866 provides:—

"The jurisdiction, both appellate and original, of the courts provided for in sections nineteen hundred and seven and nineteen hundred and eight shall be limited by law."

Section 1908 provides:—

"The judicial power in Arizona shall be vested in a Supreme Court and such inferior courts as the legislative council may by law prescribe."

This last provision, though not specifically mentioning District Court, is not to be construed as excluding the same.

Ex parte Lathrop, 118 U. S. 113-117.

This is made very clear by section 1868, which endows the District Courts with both chancery and common-law jurisdiction. The District Courts are, therefore, by section 1868, granted common law and chancery jurisdiction, and by section 1866 this common law and chancery jurisdiction "shall be limited by law."

The meaning of this phrase "shall be limited by law" has already been fixed by this Court in the case of *Ferris* v. *Higley,* 20 Wall. 375. In this case the question arose as to whether an act of Utah conferring general common law and chancery jurisdiction upon a probate

court was valid. It was contended that this legislation was authorized by section 1868, U. S. R. S., and that the phrase "shall be as limited by law" meant such law as might be enacted by the Territorial Legislature. The Court held that the phrase "shall be as limited by law" referred not to such law as might be enacted by the Legislature, though that might sometimes be included, *but to the organic act itself and to the general history of our jurisprudence.* Mr. Justice Miller, in delivering the opinion of the Court, saying (p. 383):

"It is supposed that a sufficient answer to this course of reasoning is found in the declaration of the ninth section of the organic act already cited, that the jurisdiction of the several courts therein provided for, 'shall be as limited by law.' The argument is that this refers to laws to be thereafter made by the Territorial Legislature, and that as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that, in deciding what law is meant in this phrase 'as limited by law,' we are wholly to exclude laws made by the Legislature of the Territory. There may be cases when that Legislature conferring new rights, or new remedies, or establishing anomalous rules of proceedings within their legislative power, may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the probate courts may be more specifically defined by Territorial statutes within the limit of the general idea of the nature of probate courts or that certain duties not strictly of that character may be imposed on them by that legislation.

"But we hold that the acts of the Legislature are not the only law to which we must look for the powers of any of these Territorial Courts. The general history of our jurisprudence and the organic act itself are also to be considered and any act of the Territorial Legislature inconsistent with the latter must be held void. We are of opinion that the one which we have been considering is inconsistent with the general scope and spirit of that act in defining the courts of the Territory, and in the distribution of judicial power amongst them, inconsistent with the nature and purpose of a probate court as authorized by that act and inconsistent with the clause which confers upon the Supreme Court and District Courts general jurisdiction in chancery as well as at common law. The fact that the judges of these latter courts are appointed by the Federal power, paid by that power—that other officers of these courts are appointed and paid in like manner—strongly repels the idea that Congress, in conferring on these courts all the powers of courts of general jurisdiction, both civil and criminal, intended to leave to the Territorial Legislature the power to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the Territory."

It is true that in Arizona, owing to the peculiar phraseology of section 1908, jurisdiction concurrent with that of the District Court may be conferred by the Territorial Legislature upon other courts. (*Ex parte Lathrop,* 118 U. S. 113.) But in this case the Legislature has cut down the powers of the District Courts and so limited the time within which it may

rule upon motions for a new trial pending before it so as to wrest from that Court the power to determine motions for new trial upon their merits, and compels the Court to render—or by force of its own acts renders—a judgment upon a motion pending in that Court upon principles purely arbitrary. For here a motion for new trial is denied, not upon its merits, not upon failure of the moving party to make his motion in due time and to present it to the Court, but upon the failure or inability of the Court to pass upon the same within an unreasonably short time.

The grant of common law and chancery jurisdiction to the District Court certainly gives to that Court power to hear and determine motions for a new trial.

The origin and history of the practice of granting new trials is obscure, principally on account of its antiquity. Bouvier says:

"The origin and practice of granting a new trial is concealed in the night of time."

Bouvier's Law Dict., New Trial.

Speaking on the same subject, Blackstone says:

"The exertion of these superintendent powers of King's Courts in setting aside the verdict of a jury and granting a new trial on account of misbehavior of the jurors is of a date extremely ancient. There are instances in the Year Books of the reigns of Edward III, Henry IV, and Henry VII of judgments being stayed (even after trial in bar) and new venires awarded because the jury had eaten and drank without consent of

the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. * * *

"The maxim at present adopted (in relation to new trials) being this, that in all cases of moment, where justice is not done upon the trial, the injured party is entitled to another trial."

Blackstone, book III, 387-388.

In Graham & Waterman on New Trials it is said, as early as 1351, a *venire de novo* was directed for the misbehavior of a jury.

The silence of the early reports on this subject is accounted for by Lord Hardwicke in *Queen* v. *Bewdley,* 1 P. Wm. 207, 213, wherein he said:

"One reason why we do not find this practice more ancient may be that there are no old reports of motions."

The fact, however, is clear that the practice of granting a *venire de novo* is very old and the difference between the grant of a *venire facias de novo* and a new trial was that in the former was generally only granted for matters appearing in the record, whereas a new trial was granted for matters outside of the record and a *venire de novo* issued thereon. See

Witham v. *Earl of Derby,* 1 Wils. 48, 56.

In our practice a *venire de novo* is nothing more than a new trial in a cause in which the verdict or judgment is erroneous in matters of law.

U. S. v. *Hawkins,* 10 Pet. 125, 131.

There has been considerable dispute as to the origin of awarding a *venire de novo* for grounds outside of the record. The first reported case in which this practice was pursued is that of *Wood* v. *Gunton,* Michaelmas, 1665, Sup. Style, 466. In this case Glynn, Ch. J., said:

"It was in the discretion of the Court in some cases to grant a new trial but this must be a judicial and not an arbitrary discretion, *and it is frequent in our books for the courts to take notices of miscarriages of juries and to grant new trials upon them.* And it is for the people's benefit that it should be so, for a jury may sometimes by indirect dealings be moved to side with one party and not be indifferent betwixt them, but it cannot be so intended of the Court."

In *Bright* v. *Eynon,* 1 Burr. 391, 393, 394, Lord Mansfield, referring to the right of new trial as a common-law right, said:

"Trials by jury in civil cases could not subsist now without a power somewhere to grant new trials. * * Most general verdicts include *legal consequences,* as well as propositions of fact; in drawing these consequences, the jury may mistake, and infer directly contrary to law. * * *

The parties may be *surprised* by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. * * *

If *unjust* verdicts, obtained under these and a thousand like circumstances, were to be conclusive forever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely *necessary to justice,* that there should, upon

many occasions, be opportunities of reconsidering the cause by a new trial."

It is clear from the foregoing authorities that the right of a party to move for a new trial and the power of the Court to determine such motion was well established at common law prior to the American Revolution. It seems clear, therefore, that when common-law jurisdiction was granted by the organic act to the District Court of the Territories, this grant carried with it the power to hear and determine motions for new trials as that was a well-recognized power of common-law Courts at the time of the grant of such power.

As said by the Supreme Court of New Hampshire: "The grant of a new trial belongs to the courts of law from immemorial usage. The power to grant a new trial is incidental to their other powers."

Merrill v. *Sherburne,* 1 N. H. 199.

This being so the Territorial Legislature cannot divest the Court of this power, but here it has done so in a roundabout, but most effectual, way, by depriving the Court of time within which to pass upon the motion and by its own act (according to the Territorial Supreme Court) deciding the motion absolutely irrespective of the merits of the case.

In the case at bar the motion for new trial was called for hearing within the period prescribed by the Arizona Statutes, to wit: the day before the last day of the term at which the motion was made. The motion was continued by the Chief Justice, before whom it was

called. According to the decision of the Supreme Court of the Territory the power of the District Court to itself determine the motion was limited in this case to twenty-four hours—a clearly unreasonable limit.

In conclusion on this point, we submit that the Legislature of Arizona has not power to curtail the jurisdiction of the District Courts by limiting the time within which that Court can pronounce judgments on matters pending before it and within the jurisdiction conferred upon it by the Revised Statutes and particularly so when the time limit prescribed was highly unreasonable, as it was in this case.

We further contend that section 1868, U. S. R. S., prohibits legislation of the character here under discussion, by which laws are made self-operating so as to render judgments in matters pending before the Courts without any action on the part of the Court.

In conclusion we submit that the acts of the Territorial Legislature under discussion in this case are, if reasonably construed, valid and in no way opposed to the organic act, but that if the construction placed upon these acts by the Supreme Court of the Territory is adhered to they must be condemned as violating the organic act in the particulars pointed out.

Respectfully submitted,

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